IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.07.2007

CORAM:

THE HONOURABLE MR.JUSTICE P.K.MISRA
AND
THE HONOURABLE MRS.JUSTICE R.BANUMATHI

O.S.A.No.379/2006

1.Arun Alexander Lakshman
Proprietor M/s.Alraj Builders,
No.15, First Main Road,
Kumaran Nagar, Chennai 600 111.

2.V.E.Arun : Appellants

Vs.

A.P.Vedavalli : Respondent

Appeal preferred against the order and Decreetal order of this Court passed in application No.2322/2006 in Tr.C.S.No.578/2002, dated 27.10.2006.

For appellants : Mr.R.Sundarrajan

For respondent : Mr.M.Vivekanandamurthy

J U D G M E N T

R.BANUMATHI, J.

This appeal is directed against the order of the learned Single Judge in A.No.2322/2006 in Tr.C.S.No.578/2002 declining to condone the delay of 714 days in filing the application under Or.9 R.13 CPC and dismissing the Petition filed under Section 5 of the Limitation Act.

2.Brief facts are as follows :-

The appellants/Defendants entered into a joint venture Agreement in March 1998 with the respondent/ plaintiff for developing her property situated at Aminjakarai. Dispute arose between the parties and hence the terms of Agreement could not be carried out and dispute led to filing of suits by both parties. Appellants/Defendants filed C.S.No.113/2001 on the file of High Court for recovery of a sum of Rs.15,00,000/- by way of damages from the respondent/plaintiff. Respondent/plaintiff has filed O.S.No. 86/2002 [instituted as informa pauperis] for declaration that the Agreement dated 06.04.1998 stood cancelled because of the non performance of the part of the Agreement by the first Defendant and for a declaration that the Sale Deed dated 31.03.1999 executed in favour of the third Defendant is null and void and for Permanent Injunction. The suit was

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transferred to High Court and renumbered as C.S.No.578/2002. The matter was posted in the list for trial and because of non appearance of appellant, the suit was decreed exparte in the year 2002. The appellants filed application A.No.5460/ 2003 to set aside the exparte Decree passed against them, which was allowed on cost of Rs.25,000/-. Aggrieved over the same, the appellants preferred O.S.A.No.7/2004 wherein the Division Bench has confirmed the order directing the appellants to deposit a sum of Rs.25,000/- within two weeks from the date of the order. In compliance with the said condition, the appellants have deposited a sum of Rs.25,000/- on 28.01.2004. Thereafter, the suit was again listed and decreed exparte on 10.03.2004.

3.E.P.Nos.59/2006 and 60/2006 were filed to execute the Decree for recovery of damages. E.P. notice was served upon the Indian Overseas Bank where the second Defendant is working for his salary attachment. Thereafter, the appellants have filed A.No.2322/2006 to condone the delay of 714 days in filing the application under Or.9 R.13 CPC in filing the application to set aside the exparte Decree.

4.In support of the application, the appellants filed affidavit stating that after the exparte Decree was set aside and matter was again taken up for trial and in view of differences with their earlier counsel, they could not pursue the matter and that the delay is not wanton or deliberate and prayed for condonation of delay of 714 days.

5.The respondent/plaintiff inter-alia resisted the application contending that the appellant had knowledge of the Decree passed on 10.03.2004 and have not taken immediate steps to set aside the same. According to the plaintiff, the application has been filed to delay the execution proceedings and the appellants have adopted dilatory tactics to defeat the claim of the plaintiff.

6.In consideration of the materials, the learned Single Judge held that the supporting affidavit is bereft of particulars. The learned Single Judge further observed that the appellants have not come to the Court with clean hands but have adopted dilatory tactics and on that ground, declined to condone the delay. The learned Single Judge also observed that appellants having been served with notice dated 21.11.2005, had knowledge of the exparte Decree but had chosen to file application only on 24.03.2006 and the delay is not satisfactorily explained.

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7.Being aggrieved by the impugned Order, appellants have preferred this appeal.

8.Whether the appellants have satisfactorily explained the delay of 714 days in filing the application under Or.9 R.13 CPC is the question involved in this intra-court appeal. Taking us through the records, the learned Counsel for the appellants would submit that the learned Single Judge was not justified in observing that the appellants have adopted dilatory tactics. It was further submitted that after receipt of notice on

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27.1.2005, the appellants through their Advocate have filed Search Memo and the appellants have taken immediate steps. Under these circumstances, it was contended that the appellants had made every endeavour to set aside the exparte Decree passed against them. It was urged that when the claim for damages is more than Rs.9,00,000/- and high stakes are involved, due opportunity is to be given to the appellants or otherwise, serious prejudice would be caused to the appellants. The learned Counsel for the appellants has placed reliance upon the following decisions :- 1969(2) SCC 770 [Lala mata Din Vs. A.Narayanan]; 1979 (4) SCC 365 [Concord of India Insurance Vs. Nirmala Devi]; 1981 (2) SCC 788 [Rafiq & Anr. Vs.Munshilal and Anr.]; AIR 1984 SC 1744 [O.P.Kathapalia Vs. Lakhmir Singh]; 1999 MLJ (Supreme Court) 114 [N.Balakrishnan Vs. Krishnamurthy]; 2000(3) LW 231 [G.P.Srivatsava Vs.R.K. Raizada & Others]; 2000 (3) LW 938 [C.Subramanian Vs. TNHB Rep. By Chairman and MD], 2007(2) CTC 58 [The Secretary, Madras Race Club Vs.Saraswathy Kailasam].

9.Countering the arguments, the learned Counsel for the respondent would submit that the inordinate delay in filing the application has not been satisfactorily explained. It was further argued that even after receipt of notice sent in November 2005, informing about the filing of the Execution Petition, the appellants have not chosen to file application immediately thereon. Under these circumstances, it was contended that the learned Single Judge has rightly observed that the appellants are adopting dilatory tactics with a view to delay the Execution proceedings. It was further urged that the appellants are deliberately changing counsel only for the purpose of delaying and for making unjustified allegations.

10.We have carefully considered the submissions and examined the records.

11.It is settled law that "sufficient cause" must receive a liberal construction so as to advance substantial justice when no negligence, or inaction, or want of bonafide, is imputable to the applicant, the over-riding consideration being doing substantial justice. The Court should not lightly condone the delay in filing the application to set aside the exparte Decree. Discretion is to be exercised like any other judicial discretion with vigilance and circumspection. The true test is whether the applicants have acted with due diligence.

12.Referring to various case laws and elaborately considering the scope and discretion in Sec.5 of the Limitation Act, in 2005(3) SCC 752 [State of Nagaland Vs.Lipok Ao and ors.], the Supreme Court has held as follows:-

> "8.The proof of sufficient cause is a condition precedent for exercise of the extraordinary restriction (sic discretion) vested in the Court. What counts is not the length of the delay but the sufficiency of the cause and shortness of the delay is one of the circumstances to be taken into account in using the discretion.
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> 12.In O.P.Kathapalia Vs. Lakhmir Singh [1984 (4) SCC 66] a

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Bench of three Judges had held that if the refusal to condone the delay results in grave miscarriage of justice, it would be a ground to condone the delay. Delay was accordingly condoned. In Collector, Land Acquisition Vs. Katiji [1987 (2) SCC 107] a Bench of two Judges considered the question of limitation in an appeal filed by the State and held that Section 5 was enacted in Order to enable the Court to do substantial justice to the parties by disposing of the matters on merit. The expression 'sufficient cause' is adequately elastic to enable the Court to apply the law in a meaningful manner which subserves the ends of justice - that being the life purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy. This Court reiterated that the expression "every day's delay must be explained" does not mean that a pedantic approach should be made. The doctrine must be applied in a rational, common-sense, pragmatic manner. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of malafides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk. Judiciary is not respected on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so. Making a justice oriented approach from this perspective, there was sufficient cause for condoning the delay in the institution of the appeal". [underlining added].

13.In N.Balakrishnan Vs.M.Krishnamurthy [1998(7) SCC 123], the Supreme Court held that acceptability of explanation for the delay is the sole criterion and length of delay is not relevant. In the absence of anything showing malafide or deliberate delay as a dilatory tactic, the Court should normally condone the delay. However, in such a case the Court should also keep in mind the constant litigation expenses incurred or to be incurred by the opposite party and should compensate him accordingly. In that context the Supreme Court observed as follows :-

"9.It is axiomatic that condonation of delay is a matter of discretion of the Court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be condonable due to want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned as the explanation thereof is satisfactory. Once the Court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior Court should not disturb such finding, much less in revisional jurisdiction, unless the

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exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first Court refuses to condone the delay. In such cases, the superior Court would be free to consider the cause shown for the delay afresh and it is open to such superior Court to come to its own finding even untrammeled by the conclusion of the lower Court".

14.Following N.Balakrishnan V.M.Krishnamurthy (supra) and referring to various other decisions, in C.Subramaniam V. Tamil Nadu Housing Board rep. By its Chairman (supra) Division Bench of this Court has laid down the following guidelines in considering applications filed under Sec.5 of the Limitation Act, seeking condonation of delay -

"To turn up the legal position - (1)the word "sufficient cause" should receive liberal construction to do substantial justice; (2) what is "sufficient cause" is a question of fact in a given circumstances of the case; (3)it is axiomatic that condonation of delay is discretion of the Court; (4)length of delay is no matter, but acceptability of the explanation is the only criterion; (5)one the Court accepts the explanation as "sufficient", it is the result of positive exercise of discretion and normally the superior Court should not disturb in such finding unless the discretion was exercised on wholly untenable or perverse; (6)The rules of limitation are not meant to destroy the rights of the parties but they are meant to see that the parties do not resort to dilatory tactics to seek their remedy promptly. (7)Unless a party shows that he/she is put to manifest injustice or hardship, the discretion exercised by the lower Court is not liable to be revised. (8)If the explanation does not smack of mala fides or it is put-forth as part of a dilatory strategy the Court must show utmost consideration to the suitor. (9)If the delay was occasioned by party deliberately to gain time, then the Court should lean against acceptance of the explanation and while condoning the delay, the Court should not forget the opposite party altogether".

15.Referring to Balakrishnan's case and other cases, in 2001(6)SCC 176 [M.K.Prasad Vs.P.Arumugam], the Supreme Court has held thus :-

"9.Again in State of West Bengal Vs. Administrator, Howrah Municipality [1972(1) SCC 366] and G.Ramegowda, Major Vs.Special land Acquisition Officer [1988(2) SCC 142], this Court observed that the expression "sufficient cause" in Section 5 of the Limitation Act must receive a liberal construction so as to advance substantial justice and generally delays be condoned in the interest of justice where gross negligence or deliberate inaction or lack of bonafide is not imputable to the party seeking condonation of delay. Law of limitation has been enacted to serve the interests of justice and not to defeat it."

16.The appellants were served with notice on 27.11.2005 in which the passing of the exparte Decree was mentioned. Though the appellants were

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served with the said notice on 27.11.2005, the appellants have chosen to file the application under Sec.5 of the Limitation Act, on 24.03.2006. Noticing the aforesaid delay, the learned Single Judge took the view that the appellants have adopted dilatory tactics and no indulgence could be shown to them in condoning the delay. The learned Counsel for the respondent relied upon AIR 1989 Andhra Pradesh 255 [M/s.Transworld Shipping Service India Pvt.India Vs.M/s.Harwan Investment and Trading Pvt. Ltd.] and AIR 1995 Rajasthan 47 [Mahesh Bhardwaj Vs.Smita Bhardwaj] and contended that materials on record show that the appellants had knowledge and hence plea of late knowledge is not tenable and delay cannot be condoned.

17.It is settled law that Section 5 application is to be construed liberally so as to do substantial justice to the parties. The provision contemplates that the Court has to go into the position of the person concerned and find out if the delay can be said to have been resulted from the cause which the petitioner had adduced and whether the cause stated in the circumstances of the case is sufficient. It is the condition precedent for the exercise of discretion that the Court must satisfy itself as to whether there was sufficient cause for exercising such discretion and condoning the delay. The expression 'sufficient cause' should be considered with pragmatism with a justice oriented approach.

18.Court has to see whether sufficient cause is shown for the delay. What is or what is not 'sufficient cause' would depend upon varied and special circumstances of each case. To decide whether sufficient cause is shown or not, it is very undesirable to act upon precedents as every Judge has to deal with particular facts of each case. In State of Kerala V. E.K.Kuriyipe [1981 Supp SCC 72], it was held that whether or not there is sufficient cause for condonation of delay is a question of fact dependent upon the facts and circumstances of the particular case.

19.Of course, the appellants had received the legal notice on 27.11.2005 and 28.11.2005 issued by the respondent's counsel informing them about the passing of the Decree in Tr.C.S.No.578/2002. The appellants had taken steps by filing Search Memo on 01.12.2005 through their previous counsel. Again Search Memo was filed only on 24.03.2006. Onbehalf of the appellants it is stated that it took time for the appellants to obtain the consent of the previous counsel on record and thereafter, they took steps in filing the Search Memo. Of course, it may be that the appellants should have been more vigilant in taking prompt steps to obtain consent from their previous counsel. But they cannot be castigated as "irresponsible litigants". The observations of the Supreme Court in Balakrishnan's Case 1999(1) MLJ 114 would be relevant :-

> "Of course, it may be said that he should have been more vigilant by visiting his advocate at short intervals to check up the progress of the litigation. But during these days when everybody is fully occupied with his own avocation of life an omission to adopt such extra vigilance need not be used as a ground to depict him as a litigant not aware of his

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responsibilities, and to visit him with drastic consequences".

20.Having regard to the materials on record, we find that the appellants had tried to explain the delay in filing the application for setting aside the exparte Decree as is evident from the averments in the affidavit. As noted above, the suit was earlier decreed exparte, which was set aside on conditional deposit of a sum of Rs.25,000/-. As against that order, the appellants preferred O.S.A.No.7/2004. The order passed by the learned Single Judge was confirmed and the Division Bench by its order dated 19.01.2004 directed the appellants to deposit a sum of Rs.25,000/- within two weeks from the date of the said order. The appellants have complied with the condition by depositing the said sum of Rs.25,000/- on 28.01.2004. Deposit of Rs.25,000/- and compliance of order in O.S.A.No.7/2004 would only indicate diligence of the appellants in pursuing the matter. Again after the suit was decreed and after receipt of legal notice on 27.11.2005, appellants have contacted their counsel to pursue the matter. Only because of the difference with their counsel, it is stated that the appellants could not immediately file Search Memo and pursue the matter. In our opinion, the learned Single Judge has not adverted to the explanation put-forth by the appellants.

21.It is averred that because of the differences with their counsel, they were not properly informed and that they were under the bonafide impression that the exparte Decree would be set aside. The appellants have further averred that only after serving of notice in the Execution Petitions, issued from the Master's Court, they came to know about the exparte Decree. In our considered view, the appellants having complied with the condition by depositing Rs.25,000/- does not stand to gain by leaving the matter exparte. This is all the more so, when the appellants themselves have filed the suit C.S.No.113/2001 for recovery of Rs.15,00,000/- by way of damages. Having regard to the conduct of the party, we are unable to subscribe to the view of the learned Single Judge that the appellants have adopted dilatory tactics.

22.No doubt in E.P.Nos.59/2006 and 60/2006, execution Notice was served upon Indian Overseas Bank for attachment of salary of the second Defendant. According to the appellants, only when Execution Petition Notice was served upon the Bank in 2006, they came to know about the exparte Decree. Pointing out serving of notice upon the appellants on 27.11.2005, the learned Single Judge faulted the appellants for not taking immediate steps to set aside the exparte Decree. Accepting the contention of the respondent/ plaintiff the learned Single Judge found that there was no reason whatsoever for not taking immediate steps when the exparte Decree was made known to the appellants even on 27.11.2005. It is in this context, the learned Single Judge has observed that the appellants have adopted dilatory tactics and have not come to the Court with clean hands.

23.Having regard to the materials on record and the conduct of the parties, we are unable to subscribe to the views of the learned Single Judge. After the appellants were served with notice on 27.11.2005, the

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appellants through their advocate have filed Search Memo on 01.12.2005 stating that they have proposed to inspect all the original records and there are not in a position to instruct their present counsel. Again on 24.03.2006, the appellants through their advocate have filed a Search Memo for inspection of the documents a copy of which was served upon the counsel for the plaintiff. We find that the appellants have made diligent efforts to search the records before respondent to the notice dated 21.11.2005 and taken appropriate steps. Having regard to the conduct of the parties, the appellants cannot be castigated as irresponsible litigants or could any dilatory tactics be attributed to them.

24.On receipt of notice on 27.11.2005, the appellants contacted their counsel and filed "Search Memo" on 01.12.2005, expressing their intention to verify the original records in Tr.C.S.No.578/2002. To that effect, the appellants had also issued notice to the respondent's counsel [dated 24.03.2006] reiterating their intention to inspect the documents in the presence of the respondent's counsel so as to respond to the notice and take appropriate steps. Filing of "Search Memo" for the purpose of verification of original records might have been the advice given by the then counsel on record. By and large, parties go by the advice of their lawyers. Law is settled that mistake of counsel may in certain circumstances be taken into account in condoning the delay and there is no general proposition that mistake of counsel by itself is always a sufficient ground.

25.Referring to 1969(2) SCC 770 [Lata mata Din Vs. A.Narayanan], in 1979 (4) SCC 365 [Concord of India Insurance Vs.Nirmala Devi], Supreme Court has held that the law is settled that mistake of counsel may in certain circumstances be taken into account in condoning delay although there is no general proposition that mistake of Counsel by itself is always a sufficient ground. It is always a question whether the mistake was bonafide or was merely a device to cover an ulterior purpose such as laches on the part of the litigant or an attempt to save limitation in an underhand way. There is nothing to show that error committed by the Advocate was tainted by any malafide motive on the part of the Counsel for the litigant.

26.We are unable to accept the contention of the learned Counsel for the respondent/plaintiff that there is unexplained and unreasonable delay between November 2005 and March 2006 is not satisfactorily explained. The appellants seem to have made endeavour to search for the records and thereafter filed application under Sec.5 of the Limitation Act along with application under Or.9 R.13 CPC. Under those circumstances, it cannot be said that the delay between November 2005 and March 2006 is un-comprehensible to shut the doors to the appellants.

27.While considering the application under Sec.5 of the Limitation Act, Court can also examine whether the petitioners have arguable points on facts and law. Spate of arguments was advanced as to certain

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corrections in the plaint. At this junction, it is relevant to note that suit was originally filed for - [a]declaration that Agreement dated 06.04.1998 stood cancelled; [b]for declaration that the Sale Deed by the Defendant in favour of the third Defendant is null and void and to cancel the same; [c]prayer for compensation - struck off; [d] Permanent Injunction restraining the Defendants from interfering with the plaintiff's possession and enjoyment of the suit property. The prayer in column [c] - compensation for Rs.9,00,000/- has been struck off. At a later point of time, when the amended plaint was filed, compensation for Rs.9,00,000/- appears to have been inserted by ink writing as prayer "e". The learned Counsel for the appellants contended that such omission and commission made in the original plaint are manipulation of the Court records and compensation prayer has been inserted at the time of filing amended copy even without an order of the Court. Per contra, the learned Counsel for the respondent/plaintiff has alleged that the appellants have surreptitiously corrected the plaint and tampered with the Court records. The learned Counsel for the respondent/ plaintiff has further submitted that the factum of compensation claimed has been categorically admitted by the first Defendant in his Written Statement and also the appellants cannot turn round and contend that subsequent insertion of claim for compensation. Placing reliance upon number of decisions, the learned Counsel for the respondent has contended that the plea of insertion in the plaint as defence is only an afterthought. It was further urged that the plea regarding compensation claim are by far the best proof of the facts that there was claim for compensation of Rs.9,00,000/-.

28.Since much arguments were advanced as to the scoring of quantum of claim of Rs.9,00,000/-, and insertion of claim for compensation in the amended plaint, each party making allegations and counter allegations, we have called for the original records and we have carefully perused the original records. In our view, certainly there is correction in the amended plaint. But who is responsible for such correction is the question.

29.Even the learned Single Judge has expressed his anguish regarding the corrections made in the Court records. We are informed that a complaint has been lodged before the Registrar and the matter has been seized of by the Registrar. While the matter is so pending before the Registrar, we are not inclined to express any opinion as to the corrections made in the plaint and insertion of compensation claim of Rs.9,00,000/- lest, it would affect the ongoing inquiry. Suffice it to note that the result of the inquiry would help the Court as well as the parties in arriving at a finality.

30.Having regard to the limited scope in this appeal, we feel under what circumstances the corrections were made is not much relevant. However, we have taken note of the fact that in the Suit Register, which is a permanent record, there is no prayer for claim of compensation of Rs.9,00,000/-. In our opinion, whether there was a claim at all for compensation of Rs.9,00,000/- in the original plaint becomes a point to be

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determined, which of course is subject to the result of the inquiry on the administrative side. When the claim itself is clouded, it would be unjust to compel the Defendants to comply with the exparte Decree for damages. In our considered view, the Defendants have arguable/triable points to put-forth, for which an opportunity is to be afforded to them by setting aside the exparte Decree.

31.When the trial Court had exercised the discretion, declining to condone the delay, normally, the Appellate Court/revisional Court will not lightly interfere. However, having regard to the facts and circumstances of the case, and the conduct of the appellants, as a whole, they cannot be castigated as irresponsible litigants. Keeping in view the varied stand and stake of the parties, the learned Single Judge could have allowed the application and condoned the delay, setting aside the exparte Decree.

32.Having regard to the facts and circumstances of the case, we find that the explanation put-forth by the appellants is satisfactory. The learned Single Judge has declined to condone the delay mainly on the ground that the execution proceedings had been initiated and that the appellants were not diligent. In our view, opportunity is to be given to the appellants to put forth their defence, particularly in respect of claim for compensation. Even though the appellants appear to be not vigilant as they ought to have been, yet their conduct on the whole does not warrant to castigate them as "irresponsible litigants". The appellants who are educated ought to have been more vigilant. But their failure to take such extra vigilance should not have been made a ground for ousting them from litigation when there is a huge claim of compensation.

33.In our view, explanation for delay of 714 days in filing the application under Or.9 R.13 CPC is satisfactorily explained. While condoning the delay, the Court should strike a just balance between the right enured to the plaintiff on the expiry of the period of limitation and the inconvenience caused to the respondent/plaintiff. We are of the opinion that the inconvenience caused to the respondent for the delay on account of the appellants' can be compensated by awarding appropriate and exemplary cost.

34.Taking note of the inconvenience caused to the respondent, in M.K.Prasad Vs.Arumugam [2001(6) SCC 176], the Supreme Court has condoned the delay on payment of exemplary cost of Rs.50,000/- to be paid to the opposite party. The Supreme Court has held as follows :-

> "We are of the opinion that the inconvenience caused to the respondent for the delay on account of the appellant being absent from the Court in this case can be compensated by awarding appropriate and exemplary costs. In the interest of justice and under the peculiar circumstances of the case, we set aside the Order impugned and condone the delay in filing the application for setting aside exparte Decree. To avoid further delay, we have examined the merits of the main application and feel that sufficient grounds exist for setting aside the exparte Decree as well".

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35.To avoid any further delay, we have also examined the merits of the main application under Or.9 R.13 CPC. In our opinion, sufficient grounds exist for setting aside the exparte Decree as well. Observing that discretionary jurisdiction has been conferred upon the Court that while setting aside the exparte Decree, the Court can put the Defendant on reasonable terms, in 2007(1)CTC 89, Tea Auction Ltd. Vs. Grace Hill Tea Industry and another, referring to various decisions, Supreme Court has held :

> "10.We may at once notice that whereas Order IX Rule 7 postulates setting aside the orders passed by the Court upon such terms of costs or otherwise; Order IX Rule 13, inter alia, postulates "payment into Court".
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> 11.What would be the meaning of "payment into Court" is the core question. .....
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> 16.Order IX Rule 13 of CPC did not undergo any amendment in the year 1976. The High Courts, for a long time, had been interpreting the said provision as conferring power upon the Courts to issue certain directions which need not be confined to costs or otherwise. A discretionary jurisdiction has been conferred upon the Court passing an order for setting aside an exparte Decree not only on the basis that the Defendant had been able to prove sufficient cause for his non-appearance even on the date when the Decree was passed, but also other attending facts and circumstances. It may also consider the question as to whether the Defendant should be put on terms. The Court, indisputably, however, is not denuded of its power to put the Defendants to terms. It is, however, trite that such terms should not be unreasonable or harshly excessive. Once unreasonable or harsh conditions are imposed, the Appellate Court would have power to interfere therewith. .... What would be reasonable terms would depend upon facts and circumstances of each case".

In the interest of justice and in the facts and circumstances of the case, we set aside the order impugned and condone the delay in filing the application for setting aside the exparte Decree on payment of exemplary cost of Rs.50,000/-.

36.The house of the plaintiffs was demolished and the work could not progress for one reason or another. When the matter earlier came up for admission before the First Bench, the appellants themselves have filed a Memo that they are prepared to deposit Rs.3,50,000/- towards the credit of the suit to show their bonafide. When the matter was heard by us, the learned Counsel for the appellants has submitted that appellants did file such a memo before the First Bench. In our opinion, directing the appellants to deposit Rs.3,50,000/- would infuse a sense of responsibility in the minds of the appellants for getting along with the matter. We feel, the circumstances of the case amply justify a direction to the Defendants to deposit a sum of Rs.3,50,000/- towards the credit of Tr.C.S.No.578/2002 as a condition for setting aside the exparte Decree.

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37.Consequently, this appeal is allowed by setting aside the order impugned. The application of the appellants for condoning the delay and for setting aside the exparte Decree shall stand allowed on payment of cost of Rs.50,000/- to be paid to the opposite party within a period of eight weeks. Amount of Rs.3,50,000/- shall be deposited to the credit of Tr.C.S.No.578/2002 within a period of eight weeks. We direct that the amount shall be invested in a nationalized Bank in Fixed Deposit, so that the amount may fetch interest to the benefit of either party. If the cost is not paid and deposit not made within the stipulated time, this appeal shall be deemed to have been dismissed and the exparte Decree passed against the appellants shall stand revived.

38.We make it clear that the observations made in this Judgment are not to be construed as expression or opinion on the merits of the case. Having regard to the stakes of the parties, we would also request the learned Single Judge to have early disposal of the matter, preferrably within a period of 10 months from the date of this order.

39.In the result, the appeal is allowed. However in the circumstances of the case, there is no order as to costs. Consequently, M.P.Nos.1 and 2 of 2006 are closed.

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Sd/-
Asst.Registrar

/true copy/

Sub Asst.Registrar

To,

The sub Assistant Registrar,
Original Side, High Court,Madras.

+1 cc to Mr.M.Vivekananda Murthy, Advocate Sr.No.41479.

JRG(CO)
dcp/17.7.07

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